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THE DRED SCOTT CASE IN THE LIGHT OF LATER EVENTS.

The decision of the majority of the judges of the Supreme Court of the United States, in the famous Dred Scott case,[1] coming when it did, instead of satisfying opposing parties upon the slavery question, was instrumental in making the issue graver and more acute, until open rebellion broke out, and this was succeeded by secession and civil war. And the outcome of this war was that two amendments were passed, known as the Thirteenth and Fourteenth Amendments to the Constitution of the United States, by white men, to protect the personal, property and contract rights of the negro. So that the decision referred to was effective to compel the adoption of the amendments referred to.[2]

That decision, for a number of decades, was the basis of bitter denunciation. A recent writer has voiced this position, in saying that "the Dred Scott decision cannot be, with accuracy, written down as usurpation, but it can and must be written down as a gross abuse of trust of the body which rendered it."[3] Yet the point of view for this judgment has shifted, so that now the justification for it does not depend upon the contention that the decision is for the most part *obiter dictum,* but upon the contention that the decision disregarded the doctrine of comity between the states, and did not discriminate between the *status* of a person who merely sojourned in a new state or made his domicil there.[4]

Relative to the position so taken, it may be said, in passing, that the application of comity by a state, to the personal status

1. Scott *v.* Sandford, 19 How. 393.
2. Slaughter House Cases, 1 Wallace, 36, 72, 73, Opinion of Miller, Justice.
3. Edward S. Corwin, Am. Hist. Rev. XVII, p. 68.
4. Corwin, loc. cit.

of a person or the property or contract rights of a resident of another state, depends upon the point as to whether the public policy of the state whose comity is so sought is thereby affected adversely. Even if a court of one state will give effect to the law of domicil of another state, yet this is a mere principle of comity between the courts, which must give way when the statutes of the country where the property is situated, or the established policy of its laws, prescribe to its courts a different rule.[5] Although it has been laid down by writers on private international law that when a slave acquired a domicil in a free state, an attempt to reduce him to slavery by his former sovereign, upon his return to his territory, would be a violation of international law,[6] yet it is doubtful whether a sovereignty would pay much attention to such a rule, if such sovereignty favored slavery, and if, as was the case in the northern states, those states immediately freed escaping slaves and refused to enforce slave contracts, so that, if there was to be any comity, it had to be shown entirely by the slave states.[7] Comity does not play the part contended for by Mr. Corwin, in the matter of divorces.[8]

Mr. Corwin does not think that the decision in the case was open to the objection that, as to the main propositions, it was *obiter dictum*.[9] But he denies that Chief Justice Taney was right in holding that Congress could not legislate, even for the Territories, so as to deprive a man of his property, and a slave owner of his slave.[10] But we shall see that this position of the Chief Justice, though claimed to have had no sanction in the then existing rulings of the courts, met with approval by later judges of the same court. The principle of development is even recog-

5. Walworth *v.* Harris, 129 U. S. 355; Oscanyan *v.* Winchester Repeating Arms Co., 103 U. S. 261; Teal *v.* Walker, 111 U. S. 242.

6. Wharton, Conflict of Laws, Sec. 105, citing Bar, Sec 47, Story, Sec. 96.

7. Cp. Osborn *v.* Nicholson, 1 Dill., 219, 226, 227. See also for other rulings, Henry *v.* Ball, 1 Wheat. 1; Groves *v.* Slaughter, 15 Pet. 449, 503 *seq.*

8. Bell *v.* Bell, 181 U. S. 175; German Sav. & Loan Assn. *v.* Dormitzer, 192 U. S. 125; Haddock *v.* Haddock, 201 U. S. 562.

9. Corwin, op. cit., pp. 54-59.

10. Corwin, op. cit., pp. 61-67.

nized by judicial opinion,[11] and there have been occasions when the Supreme Court of the United States, took back things it had said and determined upon the most careful consideration[12]; but it does not seem to have taken back any of the fundamental propositions relied upon and held to be sound in the decision of the court in the Dred Scott case. In fact, passion, which pilloried the decision in that case, has carried opinion in our recent days to another extreme, in states which are not confronted with the emancipation question. The Chinese have been a cause of hatred and dislike in the states on the Pacific coast for many generations, and those states have, notwithstanding the lessons in liberty taught by the civil war, found ways to carry through legislation, in the halls of Congress, which put the contention of the judges in the Dred Scott case entirely in the shade, and make slavery a lesser evil. It is sufficient to say that this legislation provides for the forcible deportation of a Chinaman although, at the time of such legislation, he had been a resident for fourteen years, merely because the Chinaman had failed to procure a certificate of residence from the proper officer, within one year from the passage of the Act.[13] That is liberty such as Caligula loved. A man was lawless who did not know a law; which was put out of his reach so that he could not know of it in time.[14] Yet the Supreme Court proceeded upon sound principles of law in sustaining this legislation. There was rather a technical adherence to the strict terms of the Fourteenth Amendment in arriving at this result; an adherence which made it difficult for the majority to reach a conclusion that the Chinaman who was born in this country could not legally be so deported. That is to say the terms of the amendment were thought not to relate to such a Chinaman, by the dissenting judges, and history was invoked

11. Holden *v.* Hardy, 169 U. S. 366, 392 *seq.*

12. The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 454 *seq.*; Hepburn *v.* Griswold, 8 Wallace, 603; The Legal Tender Cases, 12 Wallace, 663; Juilliard *v.* Greenman, 110 U. S. 421.

13. Chinese Exclusion Cases, 130 U. S. 581; Quock Ting *v.* United States, 140 U. S. 417; Wan Shing *v.* United States, 140 U. S. 424; Fong Yue Ting *v.* United States, 149 U. S. 698; United States *v.* Wong Kin Ark, 169 U. S. 649.

14. See the case of Fong Yue Ting, 149 U. S. 698.

to show that in the Senate, while the Civil Rights Bill and the Fourteenth Amendment were up, members were industriously endeavoring to so frame these measures as to leave the Chinese out.[15] *O tempora! O mores!*

But to recur to the decision in the Dred Scott case. In different connections, and in the solution of different points, that decision on the points decided therein, has played a determinative part, even up to late days.[16] We pass these instances with a bare reference in a note. But there is one especial case which ought to be mentioned more fully, in that connection. It is the case of Downes *v.* Bidwell.[17]

The destruction of the battleship Maine, in the harbor of Havana, was quickly followed by the destruction of the Spanish fleet of war vessels, in the harbor of Manila, and this was followed by the same policy of good will and humanity, whereby

15. See United States *v.* Wong Kim Ark, 169 U. S. 649, 697-699. See also Elk *v.* Wilkins, 112 U. S. 94.

16. See M. C. & L. M. R. Co. *v.* Swan, 111 U. S. 379, 383; Anglo-Am. Prov. Co. *v.* Davis Prov. Co. No. 2, 191 U. S. 378, on the point as to what is proper practice in that court, where the case in the lower court went off on a plea in abatement on the question of jurisdiction.

Bethel *v.* Matthews, 13 Wallace, 1; Avendano *v.* Gay, 8 Wallace, 376, and hosts of other cases, on the point that one may not complain of an error in his own favor. On taking meaning of framers of the constitution in construction, see Sparf *v.* United States, 156 U. S. 51, 90; also see Prigg *v.* Comm. of Pennsylvania, 16 Pet. 537, 621; Cooley *v.* Board of Wardens, 12 How. 299, 313, *seq.;* The Laura, 114 U. S. 411, 416; Auffmordt *v.* Hedden, 137 U. S. 310, 329; McPherson *v.* Blacker, 146 U. S. 1, 27; Kepner *v.* United States, 195 U. S. 126.

On citizenship see Elk *v.* Wilkins, 112 U. S. 94; Boyd *v.* Nebraska, 143 U. S. 135.

On territories see Hawaii *v.* Mankichi, 190 U. S. 197; Kepner *v.* United States, 195 U. S. 100; Kopel *v.* Bingham, 211 U. S. 468; Martinez *v.* Asociacion de Sonoras, 213 U. S. 20; United States *v.* R. R. Co., 213 U. S. 366; Dist. of Columbia *v.* Brooke, 214 U. S. 138; Dorr *v.* United States, 195 U. S. 138; Weems *v.* United States, 217 U. S. 349.

17. 182 U. S. 244. See for reference to opinion in re Scott *v.* Sandford, in opinion by Brown, J., 273, 274; in opinion of White, J., 291 *seq.;* to reference in opinion of Fuller, C. J., 360 *seq.*

Porto Rico became the possession of the United States. And here a new point came before the Supreme Court, produced by the attitude of Congress in regard to the tariff, whereby it became necessary to discriminate between the island territory acquired by the United States, and the other territory held by it, so that the island possessions could still be subjected to a tariff imposition, which, constitutionally, could not be made to obtain as to the Territories of the United States. When the Foraker Act came before that Court, it had to settle the question whether merchandise brought into the port of New York from Porto Rico, after the passage of the Act referred to, was exempt from duty, notwithstanding the third section of that Act, which required the payment of "fifteen per centum of the duties which are required to be levied, collected and paid upon like articles imported from foreign countries." And this involved the question as to whether the provisions of Article one, section eight, of the Constitution, which declared that "all duties, imposts and excises shall be uniform throughout the United States," applied to the newly acquired territories, of its own force. There were five opinions. Mr. Justice Brown, who delivered the opinion which was treated as the decision of the court, rendered an opinion for himself alone; Mr. Justice White delivered an opinion in which Justices Gray, Shiras and McKenna concurred; this took different ground from that taken by Mr. Justice Brown. Mr. Justice Gray also handed down an additional opinion. Chief Justice Fuller handed down an opinion, dissenting from the decision of the majority of the judges, and his opinion was concurred in by Justices Harlan, Brewer and Peckham. Mr. Justice Harlan also delivered an additional opinion. Mention is made of these opinions, because Mr. Corwin makes the point that, in the Dred Scott Case, there were six opinions, showing that the Justices who agreed in the decision found no ready and common ground upon which to base the decision of the court. The disagreement of judges, in arriving at a decision, is not exceptional to the Dred Scott case. We see it exemplified in the case now under consideration.[18] It tends to show that the

18. See also the opinions of the judges in re Pollock *v.* Farmers' Loan and Trust Company, 157 U. S. 429, and, on rehearing, 158 U. S. 601.

judges have given the matter mature thought; rather than the contrary. One must start out with the idea that the judges were bent upon deciding against the contention of Dred Scott's counsel upon all points, whether or no, irrespective of right and principle, in order to find fault with the fact that the judges arrived at their conclusions by different lines of reasoning. It was indeed a material question in the Downes-Bidwell case to determine how far the Constitution restrained Congress in legislating for the territories; just as it became material for the judges, in the Dred Scott case, to determine that proposition, in response to the argument of counsel, and the attitude of the judges who did not concur in the decision in that case.

And arguing upon that point it was felt to be necessary by all the judges in the Downes-Bidwell case to deal with the decision of the court in the Dred Scott case; especially that part which has come under special animadversion in the past. So Mr. Justice Brown, in delivering the opinion handed down by him, after dealing with other cases took up that decision. Speaking of the opinion of the Chief Justice he said: "It was sufficient to dispose of the case without reference to the question of slavery, but, as the plaintiff insisted upon his title to freedom and citizenship by the fact that he and his wife, though born slaves, were taken by their owner and kept four years in Illinois and Minnesota, they thereby became free, and upon their return to Missouri became citizens of that state, the Chief Justice proceeded to discuss the question whether Scott was still a slave."[19] Mr. Justice Brown did not think that the case called for a ruling upon the point as to whether all the provisions of the Constitution extended, of their own force, to the territory west of the Mississippi. Yet he said: "If the assumption be true, that slaves are indistinguishable from other property, the inference from the Dred Scott case is irresistible that Congress had no power to prohibit their introduction into a territory. It would," said the Justice, "scarcely be insisted that Congress could with one hand invite settlers to locate in the territories of the United States, and with the other deny them the right to take their property and belongings with them. The two are so inseparable

19. 182 U. S. 272.

from each other that one could scarcely be granted and the other withheld without an exercise of arbitrary power inconsistent with the underlying principles of a free government. It might indeed be claimed with great plausibility that such a law would amount to a deprivation of property within the Fourteenth Amendment."[20] Here we see the refutation of Mr. Corwin, already mentioned, regarding the inapplicability of the "vested rights" theory to the territories. Nevertheless the learned Justice sought to discredit the utterances of Chief Justice Taney, in the case alluded to, by seeking to show that those utterances occurred at a time of excited political conditions, and went into matters which were not necessary.[21] And he seems to have agreed with Mr. Benton, that the Court erred in refusing to make a distinction between property in general, so far as comity of the states was concerned, and a wholly exceptional class of property. A Virginian might, it was declared, carry his slave into the territories but he could not thereby carry with him the Virginian law which made him a slave.[22] As if a slave in Virginia might not continue to be a slave in a sister state, which recognized slavery, merely because in some details there might be

20. 182 U. S. 274, 275.

21. 182 U. S. 274. He said: "We are not, however, bound to overlook the fact that, before the Chief Justice gave utterance to his opinion upon the merits, he had already disposed of the case adversely to the plaintiff upon the question of jurisdiction, and that, in view of the excited political condition of the country at the time, it is unfortunate that he felt compelled to discuss the question upon the merits, particularly so in view of the fact that it involved a ruling that an Act of Congress, which had been acquiesced in for thirty years was declared unconstitutional. It would appear from the opinion of Mr. Justice Wayne that the real reason for discussing these constitutional questions was that 'there had become such a difference of opinion' about them 'that the peace and harmony of the country required the settlement of them by judicial decision.' The attempt was not successful. It is sufficient to say that the country did not acquiesce in the opinion, and that the civil war, which shortly thereafter followed, produced such changes in judicial, as well as public sentiment, as to seriously impair the authority of that case." It is the purpose of the present article to show that the authority of that case has not been impaired in any of its legal phases.

22. 182 U. S. 275.

differences between the two states? For elsewhere than in slave states the public policy was opposed to slavery, and, as to these, as already shown, there was no comity on the slave question or status. Had there been, the Supreme Court of Missouri would have held Dred Scott and his wife to have been emancipated by their owner, by taking and keeping them in free states for four years; but it did not do so.

Passing to the opinion delivered by Mr. Justice White in the Downes *v.* Bidwell case, we note that it antagonizes the opinion of Mr. Justice Brown, as to the very point which called for the strictures on the opinion of Chief Justice Taney. This point was that, among other things, Chief Justice Taney overshot the mark, by deciding that all of the provisions of the Constitution applied to the territories; Mr. Justice Brown conceiving that this was unnecessary—although he conceded that there were some provisions which did so apply. We saw that he conceded that the right of property was so protected. It is right here that Mr. Justice White raised a protest. He declared that, in his opinion, all of the provisions of the Constitution were applicable to the territories, as well those pertaining to imposts as those applicable to property. And he said: "To justify a departure from this *elementary* principle [of construction] by a criticism of the opinion of Mr. Chief Justice Taney in Scott *v.* Sandford, appears to [him] to be unwarranted"; that "Whatever may be the view entertained of the correctness of the opinion of the court in that case, insofar as it interpreted a particular provision of the Constitution concerning slavery and decided that as so construed it was in force in the territories, this in no way affects the principle which that decision announced, that the applicable provisions of the Constitution were operative."[23] In this view three other judges concurred. And the four judges joined with Mr. Justice Brown in the same decision, upon the ground that to them it seemed that Congress had the option to say when new conquests should be incorporated as a state or territory, subject to the Constitution, and that it had not shown, by any action, that it intended to incorporate Porto Rico into the galaxy of territories, within the meaning of the Constitution, up to the de-

23. 182 U. S. 291.

cision of the case.[24] The dissenting judges found no occasion to criticise any opinion in the Dred Scott case, but, through the Chief Justice, followed that case, holding firmly to the position that the power to legislate respecting any territory, no matter how acquired, was limited by the restrictions of the Constitution.[25]

So then, although Mr. Justice Miller, in the Slaughter House cases, took occasion to say that the decision in the Dred Scott case in holding that a slave, though freed, could not be a citizen, "met the condemnation of some of the ablest statesmen and constitutional lawyers of the country,"[26] it does not seem to have lost caste in the Supreme Court of the United States as an authority. Indeed that great judge, whatever his prejudices may have been, conceded that the decision had never been overruled.[27] It made necessary the adoption of the Thirteenth Amendment.[28]

Surely the law is passionless. The decision in the Dred Scott case was sound in principle. When the tumult of anger and outrage, engendered by the slavery question had passed away, and judges were confronted with the principles announced by that decision, they did not disregard it. The tribute which Mr. Justice Brown paid to the ruling, that as to property rights the decision was impregnable, shows that there was lasting quality in that decision, which, when occasion should compel, would come out. When passion shall control the rulings of judges, so that the principles of law shall be disregarded by the judges of our courts, then we shall cease to be a nation of laws and not of men. Let us hope that such a state of affairs will never obtain. And let us congratulate ourselves that so conspicuous an example of this healthy principle of government has been furnished by the supreme tribunal of the land.

MORRIS M. COHN,
in the American Law Review.

24. 182 U. S. 311 *seq.*
25. 182 U. S. 360, 361, *seq.*
26. Slaughter House Cases, 16 Wall. 36, 72, 73.
27. Loc. cit.
28. Loc. cit.